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COURT REPORTER

**In the Supreme Court of the United States**

**OCTOBER TERM, 1954 51**

**SUTPHEN ESTATES, INC., APPELLANT**

**vs.**

**THE UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**MOTION TO AFFIRM**

IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

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Equity No. 87-273

SUTPHEN ESTATES, INC., PETITIONER-APPELLANT  
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WARNER BROS. PICTURES, INC., ET AL., DEFENDANTS-  
APPELLEES

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**MOTION TO AFFIRM**

Pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court, appellee United States of America moves that the judgment and order of the district court be affirmed.

This is a direct appeal from an order entered on February 26, 1951 denying the appellant leave to intervene in a civil proceeding brought by the United States under Section 4 of the Sherman Act, against Paramount Pictures, Inc., and seven other leading distributors of motion-picture films and certain of their subsidiaries and from a consent judgment entered on January 5, 1951, terminating the civil proceeding. Appeal was allowed on March 2, 1951, and appeal papers were served

on March 6, 1951. Jurisdiction of the appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. The application for leave to intervene was made and denied under the following circumstances:

The principal proceeding was instituted by the United States in July 1938. Various violations of the Sherman Act were charged and comprehensive relief was prayed. On November 20, 1940, a decree was entered by consent against five of the defendant distributors—including Paramount Pictures, Inc.—and their defendant subsidiaries. The consent decree provided, *inter alia*, a trial period of three years for most of its provisions.

On August 7, 1944, the Government filed an application for modification of the consent decree. The answer of the consenting defendants denied any right to such relief and the case was set down for trial of all issues against all defendants. After the district court had entered a final judgment on December 31, 1946 (*United States v. Paramount Pictures, Inc.*, 70 F. Supp. 53 (S.D. N.Y.)), all the defendants appealed from the judgment. The United States also appealed upon the ground that the relief granted by the judgment was inadequate.

On May 3, 1948, this Court affirmed the judgment below in part and reversed it in part, and remanded the cause to the district court for further proceed-

ings in conformity with the Court's opinion. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131. The Court upheld the district court's findings as to defendants' violation of the Sherman Act and, on the question of relief, it affirmed many of the provisions of the district court's judgment. Other provisions of the judgment, however, were set aside upon the ground that they failed to give adequate relief.

On November 8, 1948, a decree was entered by consent against the RKO group of defendants. On March 3, 1949 a decree was entered by consent against the Paramount group of defendants. On February 8, 1950 the district court entered a judgment against all the other defendants. This judgment required divorcement of the production and distribution parts of the businesses of the three remaining integrated defendants from their theatre holding exhibition interests. It also required plans of divorcement and divestiture to be filed. On appeal this Court affirmed that judgment. *Loew's, Inc., et al. v. United States*, 339 U.S. 974.

On January 4, 1951, a proposed consent decree against defendant Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, and Warner Bros. Circuit Management Corporation was presented to the court. The decree contains elaborate provisions designed to achieve divorcement of Warner's exhibition activities from

its production and distribution activities. The divorcement is to be completed within 27 months.

On the same day on which the consent decree was submitted, appellant presented to the district court an application for intervention. The application set forth that the appellant had leased a theatre to a subsidiary of Warner Bros., Inc. on a long term lease and that Warner Bros., Inc. had guaranteed fulfillment of the obligations of the lease. Intervention was sought to have the judgment modified to provide that the guarantee be assumed both by the new company to be organized to take over the picture making and distributing assets, and the new company to be organized to take over the theatre assets. Appellant's motion for intervention was denied, and on January 5, 1951, the consent judgment was entered.

1. Appellant was plainly not entitled to intervene as of right. No statute of the United States gives appellant an unconditional right to intervene; it is not bound by the consent decree; nor will any property in which it has an interest be adversely affected by the consent decree.<sup>1</sup> See *Allen Calcu-*

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<sup>1</sup> Rule 24(a) of the Rules of Civil Procedure provides:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

*tators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 140-141. And no provision of the consent decree gives appellant a right of intervention. Cf. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502. Appellant has no greater right to intervene in order to prevent divorcement of Warner Bros., Inc. than would an ordinary creditor in a suit against his debtor by a third person. In either case the result of such suit might be to reduce the assets of the debtor but that is a risk inherent in being an unsecured creditor. As an unsecured potential creditor, appellant would have no standing to object to the dissolution of its guarantor by operation of law. And whatever rights appellant may have under the guarantee, it has no standing to demand that the judgment in the antitrust proceeding should protect it from any possible future loss. This is not to say that if appellant should at some time in the future suffer injury covered by the guarantee, it will be foreclosed from asserting in an appropriate tribunal any legal rights which it may possess against Warner Bros., Inc. or its successors in interest. But any assertion of injury now is premature.<sup>2</sup>

At the present time, even if it be assumed that appellant is entitled to the equivalent of its original

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<sup>2</sup>Appellant's counsel appears to have been aware on the argument of the petition for intervention that the claimed injury had not yet occurred (Tr. 22):

"It may be that we are here prematurely, but it seemed to us important to bring to the attention of the Court at our earliest opportunity the situation that we are confronted with."

guarantee, there is no showing that the offer to substitute a guarantee of the proposed theatre corporation<sup>3</sup> would not be such an equivalent. The guarantee of the theatre holding company might be not only adequate but even more than equivalent because the theatre company will be freed from the fluctuations of the distribution business. In *Partmar Corporation v. United States, et al.*, 338 U.S. 804, this Court affirmed denial of intervention in a case where the claimed injury from the consent decree was at least as direct and certain as is the present one. The appellant in that case was a theatre lessee who was facing eviction as a direct consequence of the fact that his franchise agreement to exhibit Paramount films had been terminated by the consent decree.<sup>4</sup>

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<sup>3</sup> Although the court below denied formal intervention, it permitted appellant to be heard in support of its motion. The transcript of that hearing shows that appellant was unable to demonstrate that any specific injury to it would result from the divorcement (Tr. 28):

"JUDGE GODDARD: How do you know that you won't receive complete protection?"

"MR. SHIMMAN: I don't know what complete protection is. We now have a guarantee of a company with all of the assets of the Warner organization behind it. The proposal now is that we take a guarantee of the new theatre company which is to have the theatre assets only, after many of the theatres have been divested. Presumably there will be a quid pro quo for them, but I do not have the equivalent of the guarantee we now have, when we are asked to take the guarantee of the theatre company only."

<sup>4</sup> In two other previous instances this Court has affirmed denials of intervention in this same case. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 176; *Ball, Trustee v. United States*, 338 U.S. 802.

2. It is equally clear that the action of the district court in denying permissive intervention was proper. No conditional right of intervention is conferred by a statute, and the applicant's claim has no question of law or fact in common with the main action.<sup>5</sup> Moreover, even if it be assumed that the court had power to permit intervention, Rule 24(b) provides that the court, in exercising its discretion, shall consider whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." The most important relief granted (as to Warner) by the consent decree is the divorcement of Warner's distribution business from its exhibition business. The relief is similar to that provided in the RKO and Paramount judgments. Thousands of theatres are involved, many of them under lease. As the district court noted at the time this matter was argued before it, "There must have been a great many situations like this in this case." To have

<sup>5</sup> Rule 24(b) provides:

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

permitted landlords of theatres of the defendants in this case to interject themselves into the proceedings to assure no change in their own status quo might have prevented this or any other decree being entered within any foreseeable period. These considerations alone plainly support the denial of intervention.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the order of the district court denying intervention should be affirmed.

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH 23, 1951.